

**UNITED STATES COURT OF APPEALS**  
**TENTH CIRCUIT**

**September 23, 2005**

**Clerk of Court**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTHONY LEO MONTES,

Defendant-Appellant.

No. 04-4133

(D.C. No. 2:03-CR-610)

(D.Utah)

**ORDER AND JUDGMENT \***

Before **BRISCOE, LUCERO,** and **MURPHY** , Circuit Judges.

Defendant Anthony Leo Montes appeals his sentence in light of the United States Supreme Court's decision in United States v. Booker, 125 S.Ct. 738 (2005). Exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a),

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\*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

we affirm Mr. Montes's sentence.\*\*

Pursuant to a plea agreement with the government, Mr. Montes pled guilty to one count of theft of firearms from a federally licensed firearms dealer, in violation of 18 U.S.C. § 922(u), and to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). After Mr. Montes stipulated to the facts underlying the calculation of his sentence, the district court sentenced Mr. Montes to 162 months. This sentence fell at the high end of Mr. Montes's guideline range of 130-162 months.

The district court sentenced Mr. Montes prior to the Supreme Court's decision in Booker, which rendered the Sentencing Guidelines advisory, rather than mandatory. 125 S.Ct. at 756-57. Relying on Booker, Mr. Montes raises one issue on appeal: whether the district court's treatment of the Sentencing Guidelines as mandatory constitutes structural error. Mr. Montes acknowledges that this argument is foreclosed by this court's *en banc* decision in United States v. Gonzalez-Huerta, 403 F.3d 727 (10th Cir. 2005). Mr. Montes, however, states that he raises the issue solely to preserve it for possible Supreme Court review.

As Mr. Montes correctly points out, we held in Gonzalez-Huerta that non-

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\*\* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1.(G). The case is therefore ordered submitted without oral argument.

constitutional error occurs when the district court treats the Guidelines as mandatory, and that “non-constitutional Booker error is not structural error.” 403 F.3d at 731-32, 734. Accordingly, we AFFIRM Mr. Montes’s sentence.

Entered for the Court

Mary Beck Briscoe  
Circuit Judge